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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/038,559	01/04/2002	Douglas Fenwick	28809.0002	7146
7590	02/02/2004		EXAMINER	
Kevin D. McCarthy Hodgson Russ LLP Suite 2000 One M&T Plaza Buffalo, NY 14203-2391			FLANDRO, RYAN M	
			ART UNIT	PAPER NUMBER
			3679	
DATE MAILED: 02/02/2004				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/038,559	FENWICK ET AL.
	Examiner Ryan M Flandro	Art Unit 3679

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 24 November 2003.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-17 and 20-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) 17 and 20-24 is/are allowed.
- 6) Claim(s) 1-16 and 25 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. §§ 119 and 120

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) All b) Some \* c) None of:  
1. Certified copies of the priority documents have been received.  
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 13) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.  
a) The translation of the foreign language provisional application has been received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892) 4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.  
2) Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) Notice of Informal Patent Application (PTO-152)  
3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_. 6) Other: \_\_\_\_\_

**DETAILED ACTION**

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

***Claim Rejections - 35 USC § 112***

2. The rejection of claims 17-19 under 35 U.S.C. 112, first paragraph, has been overcome by way of applicant's amendment (submitted 24 November 2003).
3. The rejection of claims 18 and 19 under 35 U.S.C. 112, second paragraph, has been rendered moot in view of the cancellation of these claims in applicant's most recent amendment (submitted 24 November 2003).

***Response to Amendment***

4. The declaration (paper no. 7) filed on 24 November 2003 under 37 CFR 1.131 has been considered but is ineffective to overcome the Cantley II reference (US 6,470,643). The Examiner's reasoning follows:

- a. First, the declaration submitted under 37 CFR 1.131 is not signed by all inventors as required by MPEP §715.04.
- b. Second, the evidence submitted is insufficient to establish an actual reduction to practice of the invention in this country or a NAFTA or WTO member country prior to the effective date of the Cantley II reference (i.e. June 18, 2001). Applicant claims a reduction to practice on or about January 29, 2001 but submits only evidence that the

mold for the lattice had been ordered and was set for delivery in December 2000. There is no evidence that the mold was actually received or that the lattice was actually made on this date. The affidavit or declaration and exhibits must clearly explain which facts or data applicant is relying on to show completion of his or her invention prior to the particular date. Vague and general statements in broad terms about what the exhibits describe along with a general assertion that the exhibits describe a reduction to practice "amounts essentially to mere pleading, unsupported by proof or a showing of facts" and, thus, does not satisfy the requirements of 37 CFR 1.131(b). *In re Borkowski*, 505 F.2d 713, 184 USPQ 29 (CCPA 1974). Thus, the conclusory statement that "the reduction to practice which was the first molding of the large offset lattice fence occurred on or about January 29, 2001" is insufficient to show actual reduction to practice prior to June 18, 2001.

c. Third, although the Examiner concedes conception prior to the effective date of the Cantley II reference (in view of the blue print submitted as Exhibit A), the evidence submitted is insufficient to establish diligence from a date prior to the date of reduction to practice of the Cantley II reference to either a constructive reduction to practice or an actual reduction to practice. As discussed above, there is no evidence sufficient to establish an actual reduction to practice either before or after the effective date of the Cantley II reference. Additionally, there is no evidence to show diligence between a time just before the effective date of Cantley II (June 18, 2001) and the constructive reduction to practice achieved by the applicant upon filing the instant application (January 4, 2002).

d. In sum, the declaration filed on 24 November 2003 under 37 CFR 1.131 has been considered but is ineffective to overcome the filing date of the Cantley II reference.

*Claim Rejections - 35 USC § 102*

5. Claim 25 is rejected under 35 U.S.C. 102(e) as being anticipated by Cantley (US 6,470,643) (Cantley II). Cantley II shows and discloses a polymeric lattice fence **100** comprising a unitary polymeric structure **100** having a framework of at least one first extension **102** and at least one second extension **104**, the first and second extensions **102,104** appear to cross one another at a juncture **130**, the first and the second extensions **102,104** appear to cross over each other at different angles to form a network of apertures between the extensions **102,104**; the first and second extensions **102,104** each having a length, a width, two side edges **110,112,122,124**, and a depth that are the same or distinct, and the first and second extensions **102,104** each have a top surface **114,118** and a bottom surface **116,120** (respectively); wherein the top surface **114,118** of the first and second extensions **102,104** are transversely convex, and the bottom surfaces **116,120** of the first and second extensions **102,104** are transversely convex. Further, Cantley II shows at the juncture **130** where the first and second extensions **102,104** appear to cross over each other, at least 50% to 95% of the depth of each side edge **110,112,122,124** is exposed and the remaining portion of the depth of each side edge **110,112,122,124** is merged with the other extension **102,104**. (See figure14-16; column 2 lines 39-54; column 6 line 10 – column 8 line 35).

***Claim Rejections - 35 USC § 103***

6. Claims 1, 2, 4-10 and 12-16 are rejected under 35 U.S.C. 102(e) as being anticipated by Cantley II.

a. Claim 1. Cantley II shows and discloses a polymeric lattice fence **100** comprising a unitary polymeric structure **100** having a framework of at least one first extension **102** and at least one second extension **104**, the first and second extensions **102,104** appear to cross one another at a juncture **130**, the first and the second extensions **102,104** appear to cross over each other at different angles to form a network of apertures between the extensions **102,104**; the first and second extensions **102,104** each having a length, a width, two side edges **110,112,122,124**, and a depth that are the same or distinct. Further, Cantley II shows a juncture **130** where the first and second extensions **102,104** appear to cross over each other, at least 50% to 95% of the depth of each side edge **110,112,122,124** is exposed and the remaining portion of the depth of each side edge **110,112,122,124** is merged with the other extension **102,104**. (See figure14-16; column 2 lines 39-54; column 6 line 10 – column 8 line 35).

i. Cantley II lacks disclosure that said first and second extensions **102,104** are planar.

ii. The prior art shown in Cantley II (see figures 2-5, *especially* figure 5) teaches that it is well known in the art to have first and second extensions that are planar depending on the particular desired aesthetic appearance of the fence (see also column 1 line 18 – column 2 line 35). Moreover, a change in the shape of a

prior art device is a design consideration within the skill of the art. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966).

iii. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the surfaces of the first and second extensions of Cantley II to be planar since such shape is well known in the art as demonstrated by the prior art figures shown in Cantley II.

- b. Claim 9. Cantley II, as applied in subsection 5(a) above, includes all of the limitations of claim 9 as well as the method of manufacturing the unitary polymeric lattice fence **100** comprising injecting a polymeric material into a mold having a predetermined shape (figure 17; column 7 line 53 – column 8 line 5).
- c. Claims 2 and 10. Cantley II, as applied above, shows the [amount of side edge **58** exposed] is about 80% [of the total depth] (see figures 14-16).
- d. Claims 4 and 12. Cantley II further discloses that the first and second extensions **102,104** are at an obtuse angle to each other (column 8 lines 32-35).
- e. Claims 5 and 13. Cantley II further discloses that the first and second extensions **102,104** are at a right angle to each other (column 8 lines 32-35).
- f. Claims 6 and 14. Cantley II further discloses that the first and second extensions **102,104** are at an acute angle to each other (column 8 lines 32-35).
- g. Claims 7 and 15. Cantley II further shows that the apertures are four-sided polygons (see figure 1).
- h. Claims 8 and 16. Cantley II further shows that the apertures are defined by a continuous curvilinear line (see figure 1).

7. Claims 3 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cantley II and the prior art of Cantley II, as applied above, further in view of Cowan (US 5,865,427). Cantley II, as applied above, discloses all the limitations of claims 3 and 11, including that the lattice is formed of plastic (column 7 line 54), but does not explicitly state that the polymeric material is polyethylene.

- a. Cowan, however, teaches that it is common to form such plastic fencing from polyethylene (column 2 lines 34-38).
- b. Additionally, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 U.S.P.Q. 416, 417-18 (CCPA 1960).
- c. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made modify the plastic lattice fence of Cantley II by providing that it be made specifically of polyethylene as taught by Cowan.

#### ***Response to Arguments***

8. Applicant's arguments filed 24 November 2003 have been fully considered but they are not persuasive.
- a. First, Applicant argues that Cantley II specifically teaches against using planar extensions since he suggests using a bow tie structure. The Examiner is not persuaded by this argument because, although Cantley II does endorse certain benefits of shaping the extensions like a bow tie, he does not explicitly deny the use of planar extensions as set forth in the prior art (figures 2-5). As such planar extensions are known in the prior art,

the claims reciting such planar structure have been rejected as being obvious as set forth above.

- b. Second, paragraphs 7 and 8 of Applicant's response (see page 10) state mere conclusory statements with no evidential support. The Examiner is not persuaded and the claims are rejected as set forth above.
- c. Lastly, as set forth above, the declaration submitted 24 November 2003 under 37 CFR 1.131 has been considered but is ineffective to overcome the filing date of the Cantley II reference.

***Allowable Subject Matter***

9. Claims 17 and 20-24 are allowed.
10. The following is a statement of reasons for the indication of allowable subject matter:
  - a. Claims 17-19. The prior art, including Cantley and Cantley II, fails to show or disclose, either alone or in combination, a space defined between the concave bottom surface of the first extension and the flat top surface of the second extension. Because claims 18 and 19 depend from claim 17 and, therefore, they are indicated as allowable for the same reasons.
  - b. Claims 20-24. The prior art, including Cantley and Cantley II, fails to show or disclose, either alone or in combination, fill between the first and second extensions, the fill for forming the curvilinear shaped apertures. Claims 21-24 depend from claim 20 and, therefore, they are indicated as allowable for the same reasons.

*Conclusion*

11. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ryan M Flandro whose telephone number is (703) 305-6952. The examiner can normally be reached on 8:30am - 5:30pm Mon-Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lynne H Browne can be reached on (703) 308-1159. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9326 for regular communications and (703) 872-9327 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

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RMF

  
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